

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 208 OF 2022
WITH CA/6305/2022 IN SA/208/2022
WITH CA/6306/2022 IN SA/208/2022**

- 1) Rakhmaji s/o Rambhau Giri,
Age 64 years, Occ. Labour,
R/o. House No. 44, Near Police
Quarter, Datta Nagar, Selu,
Tq. Selu, Dist. Parbhani.
- 2) Vasant s/o Nathoba Rodge,
Age 69 years, Occ. Agriculture,
R/o. Near Shankarling Mandir,
Suraj Mohhalla, Selu,
Tq. Selu, Dist. Parbhani.
- 3) Manik s/o Shyamrao Shinde,
Age 74 years, Occ. Labour,
R/o. Near Shankarling Mandir,
Suraj Mohhalla, Selu,
Tq. Selu, Dist. Parbhani.
- 4) Salikram s/o Apparao Rodge,
Age 71 years, Occ. Agriculture,
R/o. Near Shankarling Mandir,
Suraj Mohhalla, Selu,
Tq. Selu, Dist. Parbhani.

... **Appellants**
(Defendants Nos.1 to 4)

VERSUS

- 1) The President,
Shankarling Mandir Sansthan Selu,
Mr. Nijling s/o Vishwnathappa Tarwadge,
Age 50 years, Occ. Agriculture,
R/o. Selu, Tq. Selu, Dist. Parbhani.
- 2) Champabai Chavan
Since deceased
Separate application for bringing legal heirs
is filed.

... Plaintiff.

... (Defendant No. 5)
... **Respondents.**

...

Advocate for the Appellants : Mr. D. M. Shinde.

Advocate for the Respondent : Mr. M. P. Tripathi.

CORAM : MANGESH S. PATIL, J.**RESERVED ON : 22.04.2022.****PRONOUNCED ON : 27.04.2022.****JUDGMENT :**

This is a second appeal by the original defendants who are facing a decree passed by the lower appellate court holding the respondent No. 1/Public Trust entitled to possession of 3206 square feet described in the plaint, from and out of Municipal House No. 176 , 220 belonging to it.

2. The respondent No. 1/Public Trust claimed that its property comprises of a temple and a dharmashala with open premises. The appellants and the respondent No. 2 who was also arrayed as defendant no. 5 were occupying the suit property illegally and claimed possession. The appellants filed two separate written statements. They admitted that the trust owns the temple, the dharmashala and the surrounding area but denied to have made any encroachment or being in unauthorized occupation of the suit property. They contended that they were in occupation of the suit property since their forefathers for more than 50 to 60 years. The appellants further contended that the then priest of the temple one Virbhadr Swami had permitted their forefathers to occupy the open space near the building of the dharmashala for their residence. They contended that they became owners of the suit property by adverse possession and the suit was barred by limitation.

3. The respondent No. 2 did not appear in the suit in spite of service of summons and it proceeded *ex parte* against her.

4. Both the sides led evidence. The trial court dismissed the suit. It held

that the respondent No. 1/Trust had failed to prove its title and the encroachment. It also recorded a negative finding to the issue formulated in respect of the appellants' claim of adverse possession.

5. Being aggrieved, the respondent No. 1/Trust challenged the judgment and order before the lower appellate court which allowed the appeal, quashed and set aside the judgment of the trial court and decreed the suit.

6. The learned advocate Mr. Shinde for the appellants would submit that the respondent No. 1/Trust had miserably failed to prove its title to the suit property. A well reasoned conclusion drawn by the trial court in this respect was unnecessarily reversed, without there being cogent and convincing reasons. Except the Public Trust Record there was nothing before the courts below to support title of the respondent No. 1/Trust. Though it was a case of alleged encroachment, no separate measurement was carried out. The lower appellate court accepted the rough sketch annexed with the plaint as a gospel truth. The suit was hopelessly barred by limitation. The lower appellate court failed to recognize its powers under Order XLI Rule 33 of the Code of Civil Procedure. The appellants were entitled to, by virtue of that provision, to support the judgment and order passed by the trial court even on the issue regarding adverse possession which was answered by the trial court against them. The lower appellate court illegally refused to permit them to take such a stance on an erroneous ground that they had not preferred any cross objection, when it was not at all required by virtue of that provision. He would submit that the lower appellate court has not decided the appeal strictly in accordance with the directions in the matter of **Santosh Hazari vs Purushottam Tiwari (Dead) By L.Rs.; (2001) 3 SCC 179**. Substantial questions of law arise for determination by this Court and the second appeal be admitted.

7. Learned advocate Mr. Shinde would, lastly, submit that even a dispute as to maintainability of the suit was raised by the appellants on the ground

of want of necessary permission of the Charity Commissioner as contemplated under Section 51 of the Maharashtra Public Trust Act (hereinafter 'the Act') but even that has been overlooked.

8. The learned advocate for the respondent No. 1/Trust Mr. Tripathi would submit that the respondent No. 1/Trust had filed the suit for possession of the suit property based on title. Apart from the conclusive evidence in the form of public trust record showing it to be the owner of the suit property, even the appellants in their written statements had specifically admitted this fact. On the contrary, they had contended that it is with the permission of the then priest that they were allowed to occupy the suit property. Besides, even they have been coming with a plea of adverse possession which presupposes that they admit its title. Even the appellants during their testimonies specifically admitted the title of the respondent No. 1/Trust. In spite of such concrete evidence, in fact the issue regarding title never arose. Overlooking all these aspects the trial court had illegally held that the title was not proved. The conclusion was grossly erroneous, perverse and arbitrary. The lower appellate court, precisely for these very reasons, has reversed that conclusion. There is no illegality much less giving rise to any substantial question of law on that count.

9. Mr. Tripathi would further submit that the appellants had also admitted that they were in permissive possession of the suit property which in itself was inconsistent with their stand of having become owners by adverse possession. Both the courts below have in this respect recorded a concurrent finding of fact which is unassailable.

10. Mr. Tripathi would submit that even if the observation of the lower appellate court that in the absence of any cross objection by the appellants they were not entitled to support the judgment and order passed by the trial court on the plea of adverse possession, are unsustainable, even independently the lower appellate court has recorded an objective finding

considering that plea and has negated it for the legal grounds. Therefore, no prejudice has been caused to the appellants.

11. Mr. Tripathi, lastly, submitted that since the suit was filed by the President of the Trust for recovery of its property which was to enure to its benefit, no permission of the Charity Commissioner was necessary under Section 51 of the Act. The lower appellate court has considered and rightly decided this issue. He, therefore, submitted that the lower appellate court has considered all the aspects, pleadings as well as evidence, and has taken a plausible view which cannot be said to be either perverse or arbitrary much less gives rise to any substantial question of law.

12. To begin with the issue of title, the appellants in their written statements specifically admitted that their ancestors were permitted to occupy the suit property by the then priest of the temple. Their only grievance seems to be that they have been in occupation of the suit property for last 50 to 60 years. The fact remains that they clearly admitted title of the respondent No. 1/Trust over the suit property. Pertinently, they have not come with any specific contention as to any other source for them to be in possession of the suit property. Besides, even in their testimonies the appellants specifically admitted that the suit property belongs to the respondent No. 1/Trust. On the contrary, they tried to put up a claim of adverse possession which presupposes that they admit the title of the respondent No. 1/Trust. If such was the state of affairs, certainly, in view of Section 58 of the Evidence Act, no further proof was required to uphold title of the respondent No. 1/Trust over the suit property. Admittedly, the suit property stood recorded in the Public Trust Register and at no point of time the appellants made any attempt to question such a record. In view of such state of affairs, the trial court had committed a gross error in recording a negative finding to the issue of title. I find no illegality in the conclusion drawn by the lower appellate court in upsetting such an unsustainable and illegal conclusion drawn by the trial court.

13. That the trial court had concluded about the appellants having failed to prove their claim of adverse possession albeit, it had dismissed the suit. It is equally true that the appellants did not prefer any cross objection before the lower appellate court in this respect. However, as has been rightly submitted by the learned advocate Mr. Shinde for the appellants, in view of the provision of Section XLI Rule 33 of the Code of Civil Procedure, they were entitled to support the decree of the trial court even on this issue of adverse possession without preferring any cross objection. Therefore, to this extent, the observation and the conclusion of the lower appellate court that the appellants were not entitled to raise this plea once again before it, is certainly not sustainable in law.

14. However, as has been rightly pointed out by Mr. Tripathi learned advocate, irrespective of such an observation, the lower appellate court has considered even the plea of adverse possession independently on its own merits by specifically formulating point No. 6 for determination. Certainly, the lower appellate court has also considered this plea of adverse possession referring to even the case law cited at the bar by both the sides. It is pertinent to note that both the courts below have recorded a concurrent finding that the appellants failed to prove adverse possession. This being a second appeal, when their conclusion is clearly based on reasonable and plausible appreciation of the pleadings and the evidence on record, as has been laid down in the matter of Narayanan Rajendran And Anr vs Lekshmy Sarojini And Ors; (2009) 5 SCC 264 merely because a different view is possible to be had by this Court, in view of the restrictions placed on its powers under Section 100 of the Code of Civil Procedure, this court is not entitled to replace its own conclusion in place of the concurrent conclusion of the two courts below.

15. Even if one intends to undertake such a scrutiny, the appellants in their pleadings as well as in their oral testimonies had clearly failed to prove all the necessary concomitants for a successful plea of adverse possession.

The principles *nec vi, nec calm, nec precario* which are *sine qua non* for such a plea have been clearly missing and if that is so, I find no hesitation in subscribing to the findings of the courts below holding that the appellants failed to prove adverse possession.

16. It appears that the appellants all the while have laboured to demonstrate that since the respondent No. 1/Trust was claiming possession of the suit property alleging it to be an encroached portion, it was imperative for the courts below particularly the lower appellate court to have noted absence of any survey or measurement. However, in my considered view, the encroachment as is understood in common parlance has been used by the respondent No. 1/Trust only to allege that they have been in unlawful possession of the suit property. It is not that the appellants own some property adjacent to the suit property and have made some encroachment over the adjoining property of the respondent No. 1/Trust. Admittedly, as has been mentioned earlier, they have been coming with a plea of having been in permissive possession of the suit property which is not only inconsistent with their plea of adverse possession but would also demonstrate that in real sense, it is a suit for possession of the suit property based on title and not a suit for possession of any encroached portion *stricto sensu*. If that be so, one cannot insist for any survey or measurement of the property of the Trust so as to conclude that the appellants are in wrongful possession of the suit property.

17. As far as maintainability of the suit in the absence of permission of Charity Commissioner under Section 51 of the Act, it is trite that when a suit is filed for protecting the property of the Trust and for its benefit, the question of absence of such permission becomes secondary. Therefore, even the submission of the learned advocate Mr. Shinde that in the absence of such permission the suit was not maintainable, is not legally sustainable.

18. To sum up, the trial court had misdirected itself in appreciating the

matter in controversy and had overlooked the pleadings and the evidence and had failed to appreciate it in the proper perspective. It was rather imperative for the lower appellate court to have stepped in, quashed and reversed the judgment of the trial court. I do not see as to how it can be said that the lower appellate court has not followed the decision in the case of **Santosh Hazari** (supra).

19. No substantial question of law arises. The second appeal is dismissed with costs.

20. Pending Civil Applications are disposed of.

(MANGESH S. PATIL, J.)

mkd/-